Nos. 18-1686/18-1711

In the United States Court of Appeals for the Sixth Circuit

AIRGAS USA, LLC,
Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner.

On Appeal from the National Labor Relations Board

BRIEF OF PETITIONER CROSS-RESPONDENT

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1686/18-1711 Case Name: Airgas USA, LLC v. National Labor Relations Board

Name of counsel: Michael C. Murphy

Pursuant to 6th Cir. R. 26.1, Airgas USA, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Airgas USA, LLC is a wholly owned subsidiary of Airgas, Inc.; Airgas, Inc. is an indirect whooly owned subsidiary of L'Air Liquide S.A., which is a public company whose shares are listed on the Paris Euronext stock exchange. Airgas, Inc. has no other "grandparent" or "great grandparent" corporations that are publicly traded.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 14, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Michael C. Murphy

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal concerns the General Counsel's evidentiary burden under the Board's *Wright Line* analysis in Section 8(a)(4) discrimination cases. Airgas respectfully states that oral argument should be heard in this case to ensure the Court has a full opportunity to understand the facts, legal issues and consequences of the National Labor Relations Board's Decision in *Airgas USA, LLC*, 366 NLRB No. 104, slip op. (2018). (Addendum ("Add.") 364).

STATEMENT OF JURISDICTION

This case involves the enforceability of an order of the National Labor Relations Board ("the Board") finding that Airgas USA, LLC ("Airgas" or "the Employer") violated the National Labor Relations Act, 29 U.S.C. (2012) ("NLRA" or "the Act") by issuing a disciplinary written warning to employee Steven W. Rottinghouse, Jr. ("Rottinghouse"). The Board has jurisdiction over the underlying matter pursuant to 29 U.S.C. § 160(a). The Board's order is a "final order" under 29 U.S.C. §§ 160(e) and (f) that disposes of all claims.

Airgas filed a petition for review of the Board's order on June 14, 2018; the Board filed a cross-application for enforcement on July 9, 2018. The Court has jurisdiction over Airgas's petition for review under 29 U.S.C. § 160(f), and it has jurisdiction over the Board's cross-application for enforcement under 29 U.S.C. § 160(e), because the unfair labor practice occurred in this circuit, and because Airgas transacts business in this circuit.

STATEMENT OF ISSUES

Whether the Board's finding that Airgas unlawfully disciplined Rottinghouse with a written warning is supported by substantial evidence and based on a correct application of the law, where neither the Board nor the Administrative Law Judge considered (a) whether Airgas would have discharged Rottinghouse even in the absence of his alleged protected activity, and (b) whether there was a causal link between the disciplinary action and Rottinghouse's alleged protected activity.

STATEMENT OF THE CASE

I. Factual Background

From its industrial gases fill plant located at 10031 Cincinnati-Dayton Road in Cincinnati, OH ("Cin-Day Plant"), Airgas employs union-represented production employees and delivery drivers to distribute packaged gases. (App. 310). Clyde Froslear ("Froslear"), the Operations Manager for a region that encompasses the Cin-Day Plant, oversees all aspects of Airgas's fill plant operations in his area while David Luehrmann ("Luehrmann"), the Facility Plant Manager, directly manages the day-to-day operations in the Cin-Day Plant. (App. 101-102). Both Froslear and Luehrmann participate in the investigation of misconduct and the issuance of discipline with Froslear providing final approval for the issuance of corrective actions. (App. 102).

Because handling and transporting pressurized gases is inherently dangerous, Airgas protects its associates and the American public by requiring each of its delivery drivers to complete regularly-assigned trainings and adhere to detailed safety work rules. (App. 259-301). These trainings and work rules cover agency regulations governing Airgas products and the handling of those products. (App.

261, 263, 272, 275, 340). The Driver Training Manual, Airgas's most comprehensive driver policy document, and the accompanying "Airgas Driver Training Manual Curriculum," both instruct that "cylinders must be strapped, chained or secured to the vehicle so that they do not move." (Id.). Further, they detail "proper cylinder nesting techniques" and specify that "[f]ailing to properly secure the load" falls under one of the "Seven Basics" of compliance, safety and accountability (CSA) for which a driver and the Employer receive citations and fines from the Department of Transportation (DOT) and other law enforcement agencies during roadside stops/inspections. (App. 261, 264, 268-279,, 284-297).

Rottinghouse, the Cin-day Plant delivery driver who filed the charge in this case, has a history of filing charges. (App. 341). On May 14, 2015, Rottinghouse filed a charge alleging that Froslear threatened to change the disciplinary process because Rottinghouse "filed grievances and filed charges with the National Labor Relations Board." (App. 326). Froslear, however, never made such a threat. (App. 27, 103,

233, 236, 348).[1] On July 7, 2015, after he was suspended for three days for purposely violating DOT regulations and working off the clock, Rottinghouse filed a charge alleging that the Respondent suspended him in retaliation for his protected activities. (App. 328, 341). Region 9 of the NLRB dismissed this charge and the NLRB General Counsel's office denied Rottinghouse's appeal of this dismissal. (App. 329-333).

On August 3, 2015, after completing part of his assigned delivery route for the day, Rottinghouse arrived back at the Cin-Day Plant with visibly unsecured cylinders on this truck. (App. 166, 364). After Rottinghouse parked, Froslear investigated his truck, observed improperly secured cylinders, hurried inside to retrieve his camera to preserve the evidence of wrongdoing, and photographed the improperly secured cylinders. (App. 39). Before issuing discipline, Froslear sought a second opinion from an Airgas's driver trainer, Mark McBride, who

[1] Dissenting Member Marvin E. Kaplan noted that "in a subsequent unfair labor practice proceeding involving the same parties, a different judge found that Froslear did make the alleged threat." (*citing Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 3 (2018)). Although Member Kaplan correctly pointed out "that finding is not part of the record in this case," it is also worth noting that the judge made her finding without the support of substantial evidence, and this finding, along with others, is subject to the Employer's appeal in Case 18-1685.

described the condition of the cylinder as "unacceptable" and confirmed that the cylinders were improperly secured, visibly "offset" and that Airgas would be "hit for insecure load just by how it looks." (App. 41-44). The only two instances of drivers failing to properly secure their cylinders were both corrected by the Respondent with a written warning. (App. 74-75, 238, 256).

II. Procedural History

Rottinghouse filed the charge in this matter on August 24, 2015. (App. 230). In it he alleged that Airgas violated Sections 8(a)(1), (3) and (4) of the Act by issuing him a written warning. (Id.). On November 18, 2015, the General Counsel proceeded to Complaint on a single allegation: that Respondent violated Section 8(a)(1) and (4) of the Act by issuing a written warning to Rottinghouse on August 5, 2015 in retaliation for his protected activity. (App. 223-226).

A hearing was held on February 16, 2016 in Cincinnati, Ohio before Administrative Law Judge Donna N. Dawson ("the ALJ"). (App. 338). The ALJ issued a Decision on July 7, 2016, finding that Airgas violated Section 8(a)(4) and (1) of the Act by issuing Rottinghouse a written warning on August 6, 2015. (App. 338-363). Airgas filed

exceptions and a supporting brief on August 4, 2016 and on June 13, 2018 a three-member panel of the Board (Member Marvin E. Kaplan dissenting) issued a Decision and Order adopting the ALJ's findings and conclusions. (App. 364-384). In adopting the ALJ's Decision, the Board uncritically endorsed the ALJ's finding of animus, her presumption of causality and her summary conclusion that the Employer failed to show that it would have disciplined Rottinghouse in the absence of his protected activities.

For these reasons, as discussed more fully below, the Court should grant Airgas's petition for review and deny the Board's cross-application for enforcement.

SUMMARY OF THE ARGUMENT

This Court should reverse the June 13, 2018 Order of the National Labor Relations Board and dismiss the Complaint. In adopting the Decision of the Administrative Law Judge, the Board ignored crucial parts of the record, misapprehended facts and misapplied the law to the facts of the record.

Airgas issued a written warning to Rottinghouse because he failed to properly secure cylinders on his truck in violation of DOT Regulations and Airgas work rules. The record indicates that this is a serious work rule violation that is always corrected with a written warning.

The evidence in the record does not support a finding of Employer animus. Moreover, even assuming animus, the evidence in the record reveals that the General Counsel failed to demonstrate a causal connection between the alleged inferred animus and the decision to discipline Rottinghouse.

ARGUMENTS

I. Standard of Review

The Sixth Circuit reviews the Board's factual determinations and its application of the law to those facts under a substantial evidence standard. *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2016). The substantial evidence standard is met "if a reasonable mind might accept the evidence as adequate to support a conclusion." *Kellogg Co. v. NLRB,* 840 F.3d 322 (6th Cir. 2016) *See also Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002) ("if the record viewed as a whole provides sufficient evidence for a reasonable fact finder to reach the conclusions the Board has reached . . .").

This relatively deferential standard does not, however, "permit the Board to ignore relevant evidence that detracts from its findings." *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6th Cir. 2013). Indeed, the 6th Circuit requires itself to examine evidence in the record that runs contrary to the Board's findings and conclusions. *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001) (". . . this court must review evidence in the record that runs contrary to the Board's findings and conclusions."). Finally, the Sixth Circuit will overturn credibility

determinations "if they overstep the bounds of reason" or "are inherently unreasonable or self-contradictory." *Caterpillar Logistics*, 835 F.3d at 542.

II. Neither Substantial Evidence Nor Application of the Law Supports the Board's Finding that Rottinghouse's Disciplinary Action was Motivated by Animus

In Section 8(a)(4) discrimination cases – under the Wright Line analysis – the burden remains on the General Counsel to establish by a preponderance of the evidence that the protected activity was a motivating factor in the discharge. National Labor Relations Act, 29 USC § 160 (Section 10(c) requires preponderance of the evidence); *Newcor, Inc.*, 351 NLRB 1034 fn. 4 (2007) (Section 8(a)(4) cases analyzed under *Wright Line* and require proof of causal connection); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002) (burden remains with the GC to demonstrate causal connection through particularized showing after burden shift that Respondent "nonetheless" acted on the basis of unlawful animus).

Although the Board may infer animus from purely circumstantial evidence, in this case substantial evidence does not substantiate such an inferred finding. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir.

1995) (Board may infer unlawful motivation from circumstances so long as substantial evidence substantiates the finding). To find both animus and pretext in this case, the Board ostensibly relied on four forms of circumstantial evidence: suspicious timing, Froslear's actions on August 3 and 4, disparate treatment and Froslear's shifting and inconsistent rationales. (App. 369). As bases for inferring animus, none of these stand up to scrutiny.

A. The Record Does not Support a Finding of Suspicious Timing

Rottinghouse had filed two different unfair labor practice charges "just a few months preceding his August 6 discipline." To read only the Board's Decision, one might reasonably conclude that the Employer had only recently learned of Rottinghouse's protected activity. But the record evidence tells a different story:

> In addition, prior to the underlying charge in this case, he filed two other charges with the Board. In the first . . . filed on May 14, 2015, he alleged that in April safety meetings, Froslear threatened to change employees' terms and conditions of employment because of his filed grievances and Board charges.

As the ALJ can't help but acknowledge, Froslear's charge-filing activity well predated the "underlying charge" and the "two other charges." Which is not to argue that a serial filer is any less protected under the

Act than an employee who files only one. But only disciplinary actions that are relatively proximate to protected conduct are suspicious enough to infer possible animus. (App. 382). Rottinghouse himself alleged that Froslear had been aware of his charge-filing activity since at least April of 2015; how else could he have made the allegations contained in his May 14, 2015 unfair labor practice charge filing? Thus, there was nothing suspicious about the timing of Airgas's decision to discipline Rottinghouse with a written warning to correct his failure to properly secure the cylinders on his truck.

B. The Record Does Not Support a Finding of Inferred Animus Based on Froslear's Actions on August 3 and 4

The Board willingly adopts the ALJ's findings that Froslear, in investigating the improperly secured cylinders on Rottinghouse's truck, created a clear record of his "disdain" for Rottinghouse's charge-filing activities. (App. 375-376). The Board and the ALJ fault Froslear for three things: (1) investigating a suspected violation of Airgas work rules, (2) documenting physical evidence before it is corrected, and (3) consulting an expert before issuing a disciplinary action. (Id.). Even though Froslear's careful investigation eliminated any doubt regarding whether the cylinders moved and whether Rottinghouse was

responsible, the ALJ still manages to infer not only animus but a disregard for safety. (App. 381). Dissenting Board Member Kaplan said it best:

> The entirety of this part of the judge's analysis is impermissibly speculative and subjective, imposing her own judgment of proper safety procedures on the Respondent without any proof from the General Counsel of their objective necessity or a departure from the Respondent's won past practice. (App. 371).

C. The Record Does Not Support a Finding of Disparate Treatment

To both support a finding of animus and to discredit Froslear's testimony, the ALJ next details what she sees as "disparate treatment or departure from established discipline procedures." (App. 357). Specifically, the ALJ sets forth two supposedly damning pieces of evidence: (1) that Froslear authorized lesser verbal warnings for some serious DOT violations, and (2) that Rottinghouse was disciplined more harshly that another employee who committed the same work rule violation. (Id.).

1. The Record Does Not Support a Finding that Froslear Corrected Severe DOT Violations with Verbal Warnings

The record contradicts the ALJ's first example – "that . . . two other employees received less severe verbal warnings "for more serious DOT violations." (App. 350, 357). The first of these two employees, Edgar Reed, was actually issued a written warning by the Employer, not a verbal warning; the record shows that the original written warning was reduced to a verbal warning. (App. 247). Rather than speculate that such a reduction was likely the result of a grievance settlement,[2] she instead errs by concluding, without any support in the record (since the General Counsel failed to elicit any testimony to the contrary), that it must nonetheless be evidence of Froslear's unyielding animus against charge-filing activity. (App. 350, 357).

[2] Reductions in disciplinary actions that result from the negotiated grievance procedure are not normally probative evidence of disparate treatment and animus. *See M & G Convoy, Inc.*, 287 NLRB 1140 (1988) (rather than adopting General Counsel's theory that reduced warnings were evidence of animus, Board held that original disciplinary actions "had a plausible basis but Respondent was flexible enough to realize in reaction to employee complaints that it might not succeed in a contractual grievance procedure.").

The record evidence also exposes her second example – the 2013 verbal warning issued to John Jeffries – as equally specious. The uncontroverted record evidence shows that this disciplinary action was not vetted by Human Resources, was not recorded on the correct disciplinary form and that Luehrman likely issued it without authorization from Froslear. (App. 106-107). There is no evidence in the record that Froslear was even aware of this disciplinary action at the time he issued the written warning to Rottinghouse. Not only did the ALJ abuse her discretion by inferring animus from her misapprehension of these two prior disciplinary actions, she overstepped "the bounds of reason" by repeatedly citing these examples to discredit Froslear's testimony.[3]

[3] As one example, the ALJ erroneously finds that Luehrman "did recall providing" the John Jeffries disciplinary action to Froslear "in connection with the General Counsel's subpoena." She provides no citation to the record to support this finding. In another example, she writes, "[n]ext, I find it incredulous, that in employee Reed's case, Froslear did not consider a commercial truck driver talking on the phone while driving on the road a serious DOT infraction." (App. 350). Again she provides no citation and the record provides no evidentiary support for this statement. The Board compounds this error when it uncritically repeats the "incredulous testimony" characterization when describing testimony that does not appear in the record. (App. 366).

2. The Record Does Not Support a Finding that Airgas Disciplined Rottinghouse More Severely than Other Employees who Improperly Secured Cylinders

The record contains only two examples of Airgas drivers improperly securing cylinders: Rottinghouse and Bill Huff ("Huff"). (App. App. 74-75, 238, 256). The record further evidences that both employee deficiencies were corrected by Airgas management with written warnings. (Id.). Despite this, the ALJ made two unsupported findings that contradict each other. First, she finds that because Huff's failure to properly secure his cylinders led to a cylinder slipping entirely out of its nest while Rottinghouse's failure to follow the same rule "only" resulted in the cylinders tilting over: ". . . the cylinders on Huff's truck pose a much greater risk of danger than those on Rottinghouse's truck." (App. 357). Once she has replaced the Airgas work rule with her subjective determination of danger levels, she find that Froslear was motivated not by safety concerns but by unlawful motive. (Id.). But then, in the very same paragraph, she finds that the discipline issued to Rottinghouse wasn't really the same as the one issued to Huff since Airgas "only" directed Rottinghouse to "properly secure cylinders" and follow other DOT and safety procedures while the discipline issued to

Huff required Huff to review DOT and SAFECOR driver requirements for securing cylinders and ride with a driver trainer. (Id.). The fact that Rottinhouse's written warning contained a less onerous set of remedial requirements further disproves the ALJ's inferential finding of unlawful motive. Using circumstantial evidence of disparate treatment to infer unlawful motivation requires evidence that the disciplined employee was treated more severely compared to other employees with similar work records or offenses. *Borel Restaurant Corp. v. NLRB*, 676 F.2d 190, 192-193 (6th Cir.1982); *NLRB v. Supreme Bumpers, Inc.*, 648 F.2d 1076, 1077 (6th Cir.1981).

D. The Record Does Not Support a Finding that Froslear Gave Shifting Explanations for Issuing a Written Warning to Rottinghouse

The ALJ errs in finding that Froslear offered shifting and contradictory rationales to support issuing a written warning to Rottinghouse. (App. 358). In support of this finding, the ALJ writes, "I do not believe Froslear's testimony that he issued the warning letter as a form of progressive discipline." (Id.). The problem is that Froslear never so testified. Even under aggressive and repetitive question from the General Counsel while sitting as a 611(b) witness, Froslear

maintained that the basis for the written warning was "the severity" of the violation and because "it was not his first DOT" violation. (App. 66-67).[4]

III. The Board Ignored Substantial Record Evidence that the Employer Would Have Issued Written Warning to Rottinghouse Regardless of his Charge Filing Activities.

The Board, in adopting the ALJ's findings, agreed that "there is no dispute that the cylinders on Rottinghouse's truck at some point tilted while they were being transported . . . and . . . Rottinghouse was responsible for . . . securing them." The record evidence is clear that (1) Airgas handled all incidents of a failure to properly secure cylinders with a written warning, (2) Rottinghouse and his union admitted that he broke this safety-related work rule and (3) Rottinghouse conceded that some level of discipline was warranted. (App. 65, 73-74, 98-99, 207, 212; 355-357). Moreover, the record demonstrates that Rottinghouse had already committed other work rule violations that similarly also ran afoul of DOT regulations. (90, 254). The Board has

[4] In one representative exchange, in response to General Counsel's question "did you tell Mr. Rottinghouse or Mr. Perkins that this is a written warning because of the progressive discipline policy?" Froslear responds, "I mentioned to him that it wasn't his first offense. And the severity of it warranted a written warning." (App. 67).

recently held that where the employer (charged party) can produce evidence of prior related disciplines, the employer will prevail in the second stage of the *Wright Line* analysis. *National Dance Institute*, 364 NLRB No. 35 (2016). Yet the Board ignored the substantial record evidence to adopt the contrary finding that the Employer's proffered reason was pretextual. (App. 357).

IV. The General Counsel Did Not Prove a Causal Link Between any Alleged Animus and the Decision to Discipline Rottinghouse

In 8(a)(4) discrimination cases, the General Counsel bears the burden of proving a "causal link" or "nexus" between an employee's protected activity and an employer's decision to discipline that employee. *Newcor Inc.*, 351 NLRB 1034 (2007); *Wright Line*, 251 NLRB 1083 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 US 989 (1982). Because the Employer issued the same level of discipline to Huff and Rottinghouse – the only two Cinday drivers to violate the work rule mandating the proper securing of cylinders, substantial evidence neither supports a finding of Employer pretext nor a finding of a causal connection between Rottighouse's specific charge filing activity and the decision to discipline him. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th

Cir. 2002) (burden remains with the GC to demonstrate causal connection through particularized showing after burden shift that employer "nonetheless" acted on the basis of unlawful animus).

CONCLUSION

Rottinghouse was disciplined because he broke a work rule. He was not disciplined in retaliation for his charge-filing activities. The Board's finding to the contrary are based on misapprehensions of the record, flawed reasoning and misapplication of the law. Consequently, the Court should grant Airgas's petition for review and deny the Board's cross-application for enforcement of its order against Airgas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 3532 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of September 2018, pursuant to 6 Cir. R. 25, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all parties indicated on the electronic filing receipt.

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